No. 80-1376

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In the Supreme Court of the United States

OCTOBER TERM, 1980

HELEN LOUISE BOWLING CORROS, ADMINISTRATRIX OF THE ESTATE OF RICARDO ABELLO CORROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the United States may be held liable under the Suits in Admiralty Act for the Coast Guard's discretionary decision not to establish a particular aid to maritime navigation.[1]

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[1]There is a question whether the petition for a writ of certiorari was timely filed. The petition in this case was filed on January 21, 1981, one day after the filing deadline, apparently on the advice of an employee of the Office of the Clerk of this Court that January 20, 1981 (Inauguration Day) was a federal legal holiday and as such tolled the deadline for filing, pursuant to Rule 29.1 of the Rules of this Court. While there appears to be no clear authority concerning the status of Inauguration Day as a federal legal holiday for purposes of Rule 29.1 (see R. Stern & E. Gressman, *Supreme Court Practice* 385 n.1 (5th ed. 1978)), Inauguration Day is a "legal public holiday for the purpose of statutes relating to pay and leave" of federal employees who are employed in the Washington, D.C., metropolitan area. 5 U.S.C. 6103(c). In any event, even if the petition was timely filed, as we demonstrate below, the question presented does not warrant review by this Court.

1. Petitioner Helen Louise Bowling Corros is the representative of the estate of Ricardo Corros, who died of injuries received when the motorboat he was operating collided with a sheet steel dike during a pleasure trip on the Cooper and Wando Rivers in Charleston, South Carolina. At approximately 8:00 p.m. on September 29, 1973, the decedent and two passengers were returning from a day of fishing when the boat ran virtually head-on into the Daniel Island contraction dike, at a point about 280 feet from the dike's channelward end. All three occupants of the boat were thrown into the water, and all were injured. Corros died of his injuries five days later (Pet. App. A-4 to A-5, A-14 to A-15).

The Daniel Island contraction dike was built pursuant to congressional authorization[2] for the purpose of increasing the water velocity in the Cooper River channel and thereby to reduce shoaling in that channel caused by siltation resulting from certain upstream activities conducted by the State of South Carolina (Pet. App. A-5, A-15 to A-16). The dike was completed in February 1959. From the Daniel Island shoreline, it runs 1,100 feet to the southwest. The first 100 feet is a rubble mound anchoring the shoreward end of a 1000-foot long sheet steel pile wall. The channelward end is anchored by a terminal cell, a sheet steel pile cylinder 23 feet in diameter filled with crushed rock. The top of the terminal cell and the top of the pile wall are elevated about nine feet above mean low water (*id.* at A-5, A-16). Given the likely condition of the tides at the time of the collision, the wall of the dike was about two feet above the water's surface and was probably not visible to an approaching boatman (*ibid.*).

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[2]See the River and Harbor Act of 1954, ch. 1264, Section 101, 68 Stat. 1250, amending the River and Harbor Act of 1940, ch. 895, Section 1, 54 Stat. 1199.

At the channel end of the dike is Cooper River Dike Light 46-A, a fifteen foot high fixed tower structure supporting an all-around white light that flashes every four seconds (Pet. App. A-5, A-16). It is the only light on the dike and is designed to mark both the channel's eastern boundary and the end of the dike. Light 46-A complies with the lateral buoyage system of the United States and correctly marks the channel and the channel user's way around the dike. On board the decedent's boat was a chart of the river that showed the position of the dike with the light at its channel end. The light was functioning properly at all pertinent times (*id.* at A-4 to A-5).

One of the injured passengers brought suit against the decedent's estate in the United States District Court for the District of South Carolina under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* (SIAA). The estate, as third party plaintiff, impleaded the United States. After a trial, the district court determined, under a comparative negligence approach, that (i) the decedent was 75% negligent based on his failure to avoid the collision despite his familiarity with the area near the dike, and (ii) the United States was 25% negligent in failing properly to light or otherwise mark the dike (Pet. App. A-13 to A-35). The court found the government partially liable on the ground that "the United States should have foreseen that small boaters would be unable to see this particular dike after dark" and concluded that the government's failure to install additional lighting "constituted negligence and a clear abuse of discretion" (*id.* at A-33 to A-34).

The court of appeals reversed that part of the district court's judgment that found the government partially liable (Pet. App. A-3 to A-11). The court of appeals ruled that the government was under no duty to provide additional lighting on the dike (*id.* at A-4; see *id.* at A-9). In addition, the court held that the government in undertaking to light the

dike did not do so negligently: "the Coast Guard undertook only to light the channel end of the dike with a light, and at no time did it fail to perform that undertaking" (*id.* at A-10).

2. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

a. Petitioner contends (Pet. 6-8) that the court of appeals erred in concluding (Pet. App. A-8) that 14 U.S.C. 86,[3] which authorizes the Coast Guard to mark obstructions on navigable waters, was inapplicable to the dike involved in this case. This contention is without merit.

The dike was built pursuant to 14 U.S.C. 81 as an aid to navigation and is therefore not classifiable under 14 U.S.C. 86 as an "obstruction." Cf. *Chute* v. *United States*, 610 F. 2d 7, 10-11 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980). Congress has the power under the Commerce Clause "to block navigation at one place to foster it at another." *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 393 (1945) (footnote omitted). This is a plenary power of Congress "to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage." *South Carolina* v. *Georgia*, 93 U.S. 4, 11-12 (1876). Hence, as the court of appeals concluded, 14 U.S.C. 86 "is inapplicable to a structure such

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[3] 14 U.S.C. 86 provides in pertinent part that the Secretary of Transporation

> may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters * * * of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require.

as the dike in this case which was constructed for a proper governmental purpose" (Pet. App. A-8).

In any event, even if 14 U.S.C. 86 applies, the United States is not liable because it breached no duty to petitioner in its marking of the dike. Liability in tort can be found only if the alleged torteasor breached a duty of care to the injured party and if the breach of duty proximately caused the injury. As the court of appeals observed, petitioner "has presented us with no authority and has introduced no evidence that would impose upon anyone a duty to mark the dike any more clearly than the United States did in this case" (Pet. App. A-9). The court's ruling is in harmony with those of other courts of appeals on this issue. See *Bearce* v. *United States*, 614 F. 2d 556 (7th Cir.), cert. denied, No. 79-1961 (Oct. 6, 1980);[4] *Chute* v. *United States, supra.*

b. Petitioner argues (Pet. 8-12) that the decision of the court of appeals is in conflict with *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), where this Court stated that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Id.* at 64-65. Petitioner's reliance on *Indian Towing* is entirely misplaced.

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[4]As the court of appeals acknowledged (Pet. App. A-11 n.9), the Seventh Circuit in *Bearce* exonerated the United States on facts virtually indistiguishable from this case by construing the SIAA to include a "discretionary function" exception identical to that contained in the Federal Tort Claims Act. Other courts of appeals have agreed that the SIAA contains a discretionary function exception. See *Canadian Transport Co.* v. *United States*, No. 77-1693 (D.C. Cir. Sept. 5, 1980); *Gercey* v. *United States*, 540 F. 2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977). The discretionary function exception would similarly bar petitioner's claim here.

While the Fourth Circuit has declined to adopt the discretionary function exception in SIAA cases, its opinion here reflects that, as a practical matter, its approach will generally yield results compatible with *Bearce*. At all events, since petitioner could not benefit from the discretionary function issue, there is no occasion to consider that issue in the context of this case.

Indian Towing teaches that the government may be held liable for negligence if it induces reliance on a warning device and then fails to maintain it properly. But here, petitioner's only complaint (Pet. 11) is that the Coast Guard failed to *undertake* a service—*i.e.*, the placement of additional lights or marking devices on the dike. There is no question that the existing light was properly constructed, sited, and functioning on the night of the collision. Under *Indian Towing*, therefore, it is clear that petitioner's complaint does not state a claim upon which relief can be granted. As mentioned above, Congress has not imposed on the Coast Guard a mandatory duty to establish aids to navigation. The mere fact that the Coast Guard has legal authority to erect additional navigational aids did not result in a duty to petitioner's decedent upon which a claim for damages may be founded.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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